July, 1963. By that time the defendant had ceased to be legally represented and he applied for an adjournment in order to obtain counsel. That application was resisted and in the event the judge made the following order:—

"I grant adjournment subject to defendant paying $250 costs by the 26th. In default defendant will be precluded from defending.

In event costs paid by defendant action adjourned to a date to be fixed by Registrar."

Some correspondence between the defendant and the plaintiff's solicitors then followed and ultimately the matter came into court again on 9th September when a submission was made to the judge and dealt with by him as stated in the following note:—

"Chan (plaintiff's solicitor) — Reports that defendant has not paid costs of adjournment as ordered.

Defendant is thereby precluded from defending."

It seems clear that that statement "Defendant is thereby precluded from defending" is a statement of the judge's decision. Thereupon the plaintiff's solicitor called the plaintiff who gave evidence and, somewhat curiously, was cross-examined by the defendant. No evidence was given by or on behalf of the defendant, presumably because the judge thought he was precluded from defending, and in the event judgment was entered for the plaintiff more or less as prayed.

Against that decision the defendant has now appealed on a variety of grounds.

Only one of these in my view calls for consideration and that is that the judge had no power to make the order he did make on 25th July that in default of payment of adjournment costs the defendant should be "precluded" from defending.

We are not concerned with the position in the subordinate courts where the rules of court are different from those in the High Court. In the High Court, however, the matter is dealt with by Order 36 rule 34 which reads as follows:—

"The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit."

There is a complete lack of English authority, so far as we have been able to advise ourselves, as to whether this rule would enable an order to be made which in terms would preclude a defendant from defending an action against him. Two Indian cases have been cited which have some bearing on the position, but the statute law in India is different from the law here and on that ground I do not think the Indian cases are of any great assistance.

My own view is that anything preventing a defendant (here we are concerned with a defendant and not a plaintiff) from being heard is so clearly contrary to the principles of natural justice as to require the most clear and explicit statutory justification and for myself I am unable to find such justification in the expression contained in Order 36 rule 34 "upon such terms.... as he shall think fit".

In any event an order for costs is like any other order of the court. It can be enforced in a variety of ways. It can be enforced by distress; it can be enforced by attachment; it can be enforced by bankruptcy proceedings. To say that making an order precluding a defendant from making his defence is an available method of enforcing an order for costs is something which I think can only be supported by the most express words in a statute. I have been shown no such express words and I would therefore allow this appeal with costs, set aside the judgment of the Court below and order a re-trial.

Barakbah C.J. and **Tan Ah Tah J.** concurred.

Re-trial ordered.

Solicitors: *S. A. Lingam*; *Dharmananda & Co.*

SYED ABDULLAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) December 9, 1963]

[Kota Bharu — Criminal Appeal No. 45 of 1963]

Customs and Excise—Concerned in importing prohibited goods—Meaning of "is concerned"—Meaning of "import"—Whether conveying of goods across river comes within definition of import—Failure of prosecution to identify accused—Confiscation of prohibited goods—Customs Ordinance, 1952, ss. 2, 131(1)(a).

The appellant was charged under section 131(1)(a) of the Customs Ordinance for being concerned in the importation of prohibited goods namely 173 sacks of rice from Siam by boat across the river. The learned President convicted the appellant and sentenced him to a fine of $5,000 or 2 years imprisonment and ordered that the rice be confiscated. On appeal,

Held: (1) in this case the prosecution failed to prove beyond any reasonable doubt that the appellant was concerned in the importation of rice as he was not conclusively identified;

(2) as the evidence showed that an offence had been committed under the Ordinance the order of confiscation of the 173 sacks of rice and the boat confirmed.

Observations on the definition of "import" and the meaning of "is concerned" in the Customs Ordinance, 1952.

CRIMINAL APPEAL.

Wan Mustapha bin Haji Ali for the appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for the respondent.

Hashim J.: In this case the appellant was charged in the Sessions Court, Pasir Mas, under section 131(1)(a) of the Customs Ordinance 1952 that he was concerned in importing prohibited goods namely one hundred and seventy three sacks of rice. The learned President found him guilty, convicted him and sentenced him to a fine

of $5,000 or 2 years imprisonment and ordered that the rice be confiscated. He now appeals against the decision and sentence.

Under the Customs (Prohibition of Import) Order 1954 (L.N. 624 dated 26th October, 1954) the importation of rice and padi in whatever form is prohibited except under and by virtue of an Import Licence. No evidence was adduced by the prosecution or the defence whether there was or was not an import licence. There is nothing in the record to show that the learned President directed his mind on this point. Presumably the prosecution relied on the provisions of section 106 of the Evidence Ordinance.

"Import" is defined in the Customs Ordinance as follows:—

> "Import" with its grammatical variations and cognate expressions means to bring or cause to be brought into the Federation by land, sea or air:....

In this case the rice was brought from Siam by boat across the river. I do not think one can define "river" as "sea". However the prosecution presumably relied on L.N. 166. Under L.N. 166 dated 24th day of March, 1953 Rantau Panjang is designated as a place of import and export by road and railway of all goods. This incident took place at Pengkalan Bukit Lata Jerang Perdah in the district of Pasir Mas. The prosecution should have led evidence to show that all goods imported from Siam had to come by railway to Rantau Panjang and that Pengkalan Bukit Lata was not a place of import.

The appellant was charged that he was concerned in importing the rice. Section 131(1)(a) of the Ordinance states *inter alia* whoever is concerned in importing or exporting any uncustomed goods or prohibited goods commits an offence. The phrase "is concerned" is not defined in the Ordinance. The *Shorter Oxford Dictionary* defines "concerned" as interested or involved. The prosecution adduced evidence to show that when the police sergeant-major entered the hut where the rice had been taken into, he saw the appellant in the hut. There is no evidence to show that the appellant was one of the six people who went to the hut from across the border on the first occasion. The police sergeant-major stated in his evidence that he saw 6 persons in the boat all males. He saw gunny sacks in the boat. One of the six persons went straight to the hut. The other 5 persons carried the sacks into the hut. The appellant was not conclusively identified as the person who first entered the hut. Suspicion however great is not evidence. I do not think one can presume that because a person is in a place where there are illegally imported goods he is concerned with the importation of such goods.

For the above reason I find that the prosecution has not proved beyond any reasonable doubt that the appellant was concerned in the importation of the rice and I would therefore allow the appeal and set aside the conviction and sentence. I would however confirm the order of confiscation of the 173 sacks of rice seized by the police as the evidence shows clearly that an offence has been committed under the Ordinance and the rice was the subject matter of this offence. I would also confirm the order of confiscation in respect of the boat.

Appeal allowed.

Solicitors: *Wan Mustapha & Co.*

KOK HOONG v. LEONG CHEONG KWENG MINES LTD.

[P.C. (Viscount Radcliffe, Lord Morris of Borth-y-Gest and Lord Guest) December 10, 1963]

[Privy Council Appeal No. 36 of 1962]

Estoppel—Agreement to hire machinery—Claim to arrears of rent due—No defence to claim—Judgment by default—Second action for arrears of rent covering subsequent period—Defences under Moneylenders Ordinance, 1951 and Bills of Sale Ordinance, 1950—Whether plea of estoppel available.

The appellant filed a plaint by way of summary procedure alleging that under an agreement dated June 20, 1952 he had let certain machinery and equipment on hire to the respondent for 12 months from the date of the agreement at an agreed monthly rent and that on expiry of the said period the respondent had continued the hiring on the same terms. The appellant claimed that the respondent was in arrears with the rental payments for the months commencing from September 20, 1953 and subsequent months and he asked for judgment for a stated sum in respect of rent and a further sum in respect of interest on arrears of rent as provided in the agreement. On November 3, 1954 the appellant obtained judgment by default, the decree reciting that the respondent had not obtained leave to appear and defend. The present action was begun on June 14, 1957. In this action the appellant sued the respondent for monies alleged to be due to him and certain other relief and he had objected to a defence or set-off defences based on certain provisions of the Moneylenders Ordinance and the Bills of Sale Ordinance put in by the respondent on the ground that the latter was estopped from raising them by virtue of a previous judgment given in an earlier action between the same parties. It was the validity of this objection that was argued and decided as a preliminary point. In the High Court Ong J. upheld it; his judgment was reversed in the Court of Appeal (Thomson C.J. (as he then was), Hill and Good JJ.A.) who decided there was no estoppel ([1962] M.L.J. 224). On appeal to the Privy Council,

Held: the decision of the Court of Appeal was correct and was entitled to be supported on two separate and distinct grounds — (a) default judgments though capable of giving rise to estoppels must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they can estop only for what must necessarily and with complete precision have been thereby determined. It is impossible on the whole in this case to say that there was anything in the first judgment which "necessarily and with complete precision" decided the issue against the respondent and therefore the estoppel claimed could not be maintained; (b) there could be no estoppel in face of the Moneylenders Ordinance since the provisions on which the respondent sought to rely rendered